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No. 84-1180

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ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1984

ANTHONY PETROV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a mail-order photo processor who specialized in producing multiple copies of pornographic photographs, was properly convicted of mailing obscene materials in violation of 18 U.S.C. 1461.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 747 F.2d 824. The opinion of the district court (Pet. App. A32-A52) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A53) was entered on October 5, 1984. A petition for rehearing was denied on November 19, 1984 (Pet. App. A54). The petition for a writ of certiorari was filed on January 17, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of conspiring to mail obscene materials and to use minors to engage in sexually explicit conduct for purposes

of producing photographs depicting such conduct, in violation of 18 U.S.C. 371, 1461, and 2251 (Count 1). He also was convicted on ten counts of mailing obscene materials, in violation of 18 U.S.C. 1461 (Counts 2, 3, and 5 through 12). Petitioner was sentenced to concurrent terms of three years' imprisonment on all counts. The sentences were suspended, however, in favor of six months' imprisonment, to be followed by a three-year term of probation. In addition, the court imposed a total of $60,000 in fines. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A31).

1. Petitioner was the owner and manager of a film processing company in North Syracuse, New York (Tr. 1495). The film processing business had two parts: a walk-in photo finishing shop, known as Crystal Photo, which handled "family type" pictures; and a mail-order operation, known as Spectra Photo, which handled pornographic materials (Tr. 1309, 1458, 1491). Starting as early as 1970, Spectra Photo placed advertisements in "adult" and "gay" magazines, such as Hustler, Penthouse, and the Advocate (see Tr. 568, 684, 788, 1040, 1108, 1206, 2668). The advertisements stated that Spectra offered "uncensored developing" or photo processing of a "confidential" nature (Tr. 568, 875, 967, 1206). At least one of the advertisements touted Spectra Photo as "the one and only source of uncensored photo processing" (Tr. 967). In response to that advertising, customers mailed in a large volume of sexually-oriented films and pictures for developing or copying.

Many of the photographs and films sent to Spectra contained pictures of children under the age of 16 engaged in sexual activity or displaying their genitals (Tr. 569, 573, 588-589, 687-688, 790-791, 879-883, 969-971, 975-978; see Tr. 1424-1425; Gov't Exhs. 1-1 through 1-11, 1-63 through 1-66, 2-1 through 2-39, 3-2 through 3-14, 4-1 through 4-45, 5-1 through 5-69). After developing the film Spectra mailed the processed film and prints back to the customer (Tr. 620,

686, 789, 879, 901). One customer, Lew Clemmons, advertised sets of the photographs developed by Spectra and sold them for $10 for a set of five (Tr. 812-813). Those photos consisted mainly of close-up pictures of a young boy masturbating (Gov't Exhs. 2-1 through 2-39). Clemmons said that he had personally taken the pictures of the boy, a 13-year old who lived in his community, and that he had re-ordered prints of the photographs on about six occasions after he sold out of copies (Tr. 789, 813; Gov't Exh. 2-41).[1]

Other customers sent photographic materials to Spectra depicting adults performing a variety of sexual acts on animals, including intercourse, fellatio, and masturbation. Those materials were processed by Spectra, and Spectra returned the finished products to the customers by mail (Tr. 1041-1046, 1108-1116; Gov't Exhs. 7-1 through 7-152, 9-1 through 9-19).[2]

Finally, other customers used Spectra to process photographs of persons undergoing apparent sexual abuse or genital mutilation (Tr. 1072-1075, 1147-1150, 1206-1209, see Tr. 1600-1601; Gov't Exhs. 8-1 through 8-42, 10-1 through 10-5, 11-1 through 11-79, 12-1 through 12-6). One of the customers in that group testified that he resold the photographs, which depicted what he called "bondage and discipline" and sado-masochistic behavior. He said that he did approximately $25,000 to $30,000 worth of business with Spectra (Tr. 1147-1149, 1158).[3]

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[1]The photographs of minors engaged in sexual activity formed the basis for the charges in Counts 2 through 6. Petitioner's convictions on these counts were reversed by the court of appeals (see pages 6-7, *infra*).

[2]The photographs of adults engaged in sexual activity with animals formed the basis for the charges in Counts 7 and 9.

[3]The photographs of genital mutilation and sexual abuse formed the basis for the charges in Counts 8, 10, 11, and 12.

Petitioner was fully aware of the nature of the photo processing operation (Tr. 1255, 1256). One of the employees, Ruth Hudson, asked petitioner how he came to handle this kind of material. Petitioner replied, "Do you think I can make any money off an average housewife like yourself?" (Tr. 1257). On another occasion, during a discussion of the kind of paper Spectra was using in printing photographs, Hudson heard petitioner say that if all the photographs were processed on Kodak paper, "who's gonna say we did it?" (Tr. 1259). According to Hudson, from late 1979 to mid-1980, there were no limitations on the subject matter of the materials that would be processed and returned to customers through the mail (Tr. 1263).

The employees frequently complained to petitioner about the nature of the photographs, particularly the child pornography. One employee, Pat Haney, approached petitioner once or twice a week to question him about whether particular orders containing photographs of children should go out (Tr. 1317, 1326). She once approached petitioner about a series of photographs of a young girl between six and eight years old who was dressed up in erotic clothing and assuming suggestive poses. In the last frames of the sequence, according to Haney, the girl was pictured with sperm on her face (Tr. 1317). Petitioner told her there was "nothing going on" in the picture and that the order was to be sent out (Tr. 1318-1319). When Haney protested his decision, petitioner became angry and again insisted that the order go out (Tr. 1319). Haney later found the order in the outgoing mail bin (*ibid.*).

At one point, petitioner told Haney that she was "carrying it too far" and that she should not bring him complaints about the child pornography materials she found in the customers' orders, but that she should go to her supervisors instead (Tr. 1326). When she subsequently brought more such materials to him, he said he could not "be bothered

with this all the time," and he devised a system under which employees would place materials containing questionable pictures of children in a special bin for his review (Tr. 1327). Haney said that the bin was used quite a bit, and that it was always "stuffed with orders" (*ibid.*).

While she was working at Spectra, Haney also saw photographs depicting bestiality, and she saw photographs depicting sado-masochistic conduct "every day" (Tr. 1324-1325). She said that to her knowledge, Spectra had no policy setting restrictions on the kinds of such photographs that the company would process (Tr. 1324-1325).

The company processed approximately 500 to 1000 prints per week for a customer named Bynum, whose photographs of bondage and sexual abuse of women were the subject of Count 11 of the indictment (Tr. 2091-2094). In the same vein, the company records reflected that nine of the customers whose photographs were the subjects of the 11 substantive counts in the indictment were regular, repeat customers of Spectra during 1982. Some of the customers submitted as many as eight orders within a one-month period (Tr. 2352-2359).

Petitioner spent much of the working day in the processing area of the plant (Tr. 2343, 2603, 3386), and admitted to his employees that he alone was responsible for deciding which orders would be sent out to customers (Tr. 2298; see Tr. 2550, 2563-2564). Petitioner spoke with an undercover agent about an order from a customer named Paton, saying that it was not necessary for him to review that order because Paton was a regular customer and because the children who were pictured were not engaged in sexual activity. Because the children were not touching or fondling one another, he said, "we can get away with sending the order out" (Tr. 1568). When the agent showed petitioner a series of photographs showing a young girl engaged in a

variety of explicit sexual acts, petitioner became angry and told her not to bring him photographs of that kind, but just to put them in his bin (Tr. 1566).

2. Petitioner testified in his own behalf at trial and called several witnesses, including two experts. The thrust of his defense was that the materials Spectra mailed to customers were not obscene, and that in any event the volume of Spectra's business was so great that he could not have been aware of the nature of all the material Spectra was processing and sending to its customers (Tr. 2773, 2824-2826).

Petitioner testified that he had a policy of not sending out photographs of children engaged in sexual activity (Tr. 2724, 2770-2772). However, he admitted that he placed no limitations on the kinds of photographs that he would process and mail to customers if the participants were over the age of 16 (Tr. 2724, 2784, 3013). In particular, he said he had no policy restricting the processing of pictures of adults engaged in sexual activity with animals, and no policy restricting the processing of pictures of adults engaged in genital mutilation or sexual abuse (Tr. 3013, 3131).

On cross-examination, petitioner admitted that in 1978 he told an FBI agent that he reviewed 90 percent of the material that was processed by Spectra (Tr. 2953). He also testified that in the year between April 1, 1981, and April 1, 1982, he had earned almost $300,000 from his photo processing operation (Tr. 2933). In one of the promotional letters that petitioner offered as evidence at trial, he characterized Spectra Photo as the largest processor of "personal films" in the country (Def. Exh. AW).

3. The court of appeals affirmed petitioner's convictions on six substantive counts and reversed his convictions on the conspiracy count and on four substantive counts that

charged the mailing of obscene photographs of children.[4] The court vacated the sentences on the surviving counts and remanded for resentencing "in order to give the district court an opportunity to reevaluate the sentences" in light of the reversals. Pet. App. A18-A19.

With respect to the surviving violations, the court was divided on a question not raised in that court by petitioner:- whether Section 1461 applies to photo processors. The majority concluded that because the statute reaches "whoever" knowingly mails obscene materials, the statute necessarily applies to commercial photo processors, like petitioner, who knowingly process pornographic materials and place them in the mail. The majority reasoned (Pet. App. A4):

> If congress did not intend to subject photo processors to criminal liability under § 1461, it would have written § 1461 to reflect that intent, either by narrowing its scope with limiting language, or by carving out a specific exception for photo processors. Not only has congress done neither of these, but the Supreme Court has consistently construed the language of § 1461 broadly. See, *e.g.*, [*United States* v.] *Reidel*, 402 U.S. [351], 355-56 [(1971)]; cf. *United States* v. *Orito*, 413 U.S. 139, 141-144 (1973) (§ 1462).

Judge Newman dissented (Pet. App. A19-A28). He observed that Section 1461 is derived from an 1872 statute, the Comstock Act,[5] and that there were no mail order film

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[4]The court concluded that petitioner could not be convicted of conspiring to engage in the sexual exploitation of minors in violation of 18 U.S.C. 2251 "because his activities as a photo processor do not fall within the proscriptions of § 2251" (Pet. App. A11). It further found that petitioner had been prejudiced by the trial court's handling of this issue and reversed the convictions under Section 1461 relating to child pornography (Pet. App. A11-A12).

[5]Act of June 8, 1872, ch. 335, § 148, 17 Stat. 302.

processors in existence at the time that the Comstock Act was passed (Pet. App. A20-A21). He noted that photo processors are subject to liability under a statute prohibiting the reproduction of sexually explicit advertisements, but the scope of that statute is limited because it applies only if the defendant knows that the advertisement will be sent to persons who do not wish to receive such materials (see 18 U.S.C. 1737). Finally, Judge Newman observed that when Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251-2253, it did not follow a suggestion by the Justice Department to list film processors among the potential violators named in the statute. From these legislative actions, Judge Newman concluded that Congress did not intend to reach photo processors under Section 1461.

Judge Newman also cited what he viewed as two practical reasons for excepting photo processors from liability under Section 1461. First, he stated that photo processors "are not * * * part of a distribution network that Congress would understandably wish to prevent from using the mails" (Pet. App. A24). According to Judge Newman, photo processors are "using the mails only to return private property to its owners" (*ibid.*). He acknowledged, however, that processors like petitioner, who print a large quantity of photos from one negative, facilitate widespread distribution of obscene materials (*ibid.*). Second, Judge Newman expressed concern that Section 1461, if applied to film processors, would oblige the processor "to make a judgment whether every photograph he prints is obscene" (Pet. App. A24). In his view, a "photo processor thus [would] become[] the censor of the nation's photographers" by refusing to mail material that he concludes is obscene (*id.* at A25-A26).

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

As the court below observed (Pet. App. A4), the plain language of the statute must be the starting point in determining whether 18 U.S.C. 1461 applies to petitioner, a commercial film processor who specialized in producing multiple copies of pornographic photographs. See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Section 1461 imposes criminal sanctions upon "[w]hoever knowingly uses the mails for the mailing" of obscene materials. The term "whoever" could not be broader; it plainly encompasses petitioner's mailings of obscene material. Petitioner has not cited any portion of the legislative history of Section 1461 that supports an exception for film processors. We also have been unable to find any legislative history that supports petitioner's claim of exemption.[6] The court below was right in concluding (Pet. App. A4-A5) that "it is for congress, and not this court, to create exceptions to the statute's clearly expressed, broad coverage."

Petitioner's contention that Congress intended to exempt photo processors from liability under Section 1461 rests upon his interpretation of the legislative history of other obscenity statutes (see Pet. 6). However, these statutes provide no support for his position. Congress *imposed* liability upon film processors under a statute enacted in 1970 (see 18 U.S.C. 1737).[7] In addition, although the court of appeals

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[6]Petitioner intimates (Pet. 5-6) that photo processors are not covered by Section 1461 because the original version of the statute was enacted before the invention of photography. The logic of this position also supports the conclusion that the mailing of obscene photographs and films does not violate the statute, a position petitioner presumably does not espouse. Moreover, Congress amended Section 1461 several times since the invention of photography but never created an exception for photographs or photo processing. See, *e.g.*, Pub. L. No. 91-662, 84 Stat. 1973; Pub. L. No. 85-796, 72 Stat. 962; Act of June 28, 1955, ch. 190, 69 Stat. 183; Act of June 25, 1948, ch. 645, 62 Stat. 768.

[7]The dissenting judge below noted (Pet. App. A21-A22) that this statute "does not place at risk every photo processor of a photograph later determined to be obscene," but that is because the purpose of the

found that Congress intended to exclude film processors from liability under a statute criminalizing the sexual exploitation of minors (see Pet. App. A5-A10), the court observed that "congress itself * * * only this year amended [the provision] by adding to its prohibitions conduct that is arguably aimed at mail-order photo processors, among others" (*id.* at A10).[8] Thus, to the extent these statutes reveal anything about the status of photo processors under Section 1461, they demonstrate that Congress is willing to impose liability upon photo processors under the obscenity laws.

Petitioner also argues (Pet. 6) that Congress could not have intended to reach photo processors under Section 1461 because such prosecutions would not advance the purpose underlying the statute. Petitioner reasons (*ibid.*) that "[a] photo processor, who receives film from a photographer, processes it and returns it to the photographer, can not reasonably be said to corrupt the morals of the sender." This Court rejected a similar argument in *United States* v. *Reidel*, 402 U.S. 351 (1971). The district court in *Reidel* had

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provision is to permit postal patrons to refuse to receive sexually oriented material. See H.R. Conf. Rep. 91-1363, 91st Cong., 2d Sess. 89 (1970). Congress did not limit the provision because of a particular concern for photo processors.

[8]The amendment imposes liability upon any person who "knowingly reproduces any visual depiction [of a minor engaged in sexual conduct] for distribution * * * through the mails." Pub. L. No. 98-292, 98 Stat. 204. Judge Newman viewed this amendment as limited to " 'the producer who pirates photos from other publications or who purchases photos for reproduction.' " Pet. App. A23, quoting H.R. Rep. No. 98-536, 98th Cong., 1st Sess. 3 (1983); see also Pet. App. A10 (majority opinion). However, other portions of the House report do not indicate that the provision is limited in this manner. H.R. Rep. 98-536, *supra*, at 7. In addition, if, as the dissent below asserts (Pet. App. A27), Congress would never impose criminal penalties upon photo processors, it is surprising that this statute does not include an explicit exception for photo processors.

held that the defendant could not be prosecuted for mailing obscene materials in response to a request from the addressee because Section 1461 "could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults. . .' " (402 U.S. at 355). This Court reversed, holding that while private possession of obscene materials could not be made a crime, "dealings in obscenity" could be reached under Section 1461 even if the recipient had requested the obscene materials. Here, petitioner produced multiple copies of obscene photographs, plainly aiding in the sale of these materials to the public. His mailing of these materials therefore is within the core of the conduct prohibited by Section 1461.[9]

Finally, petitioner predicts (Pet. 7-8) that the decision of the court below will expose legitimate photo processors such as the Eastman Kodak Company to criminal liability. In petitioner's view, all photo processors "will err well on the side of caution and will refuse to return countless photographs that are not obscene" (Pet. 8). The question of the liability of legitimate photo processors under Section 1461 is not presented here because petitioner's company was not by any stretch of the imagination a legitimate photo processor. Unlike Kodak or Photomat, Spectra Photo specialized in pornography. It solicited business from the readers of "adult" magazines, holding itself out as "the one and only source of uncensored photo processing" (Tr. 967). Many of

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[9]Petitioner's description (Pet. 6) of *Redmond* v. *United States*, 384 U.S. 264 (1966), is somewhat incomplete. The Court in that case acted in response to a motion by the Solicitor General to vacate the judgment of the court of appeals on the ground that the prosecution was contrary to the government's policy of prosecuting the mailing of private correspondence only in cases involving aggravating circumstances such as repeated involvement with obscene materials by the defendant (*id.* at 265). That policy obviously would not bar the prosecution of petitioner.

Spectra's customers purchased multiple reprints of a single photograph or negative for resale. Moreover, petitioner took an active role in monitoring customers' orders. There was overwhelming evidence that he knew the nature of the photographs that were developed by his company, and that some of his customers purchased large numbers of reproductions that could only have been destined for sale. In sum, Spectra was an essential link in the distribution of pornography by its customers. See pages 2-6, *supra*.

There is no reason to believe that Congress intended to exempt persons such as petitioner from liability under Section 1461. Even the dissenting judge below acknowledged that "the photo processor who prints a large quantity of photos from a negative or an original print facilitates widespread distribution by others" (Pet. App. A24). Producers of pornography cannot avoid liability under Section 1461 by structuring their operations as mail-order photo processing businesses.

Second, contrary to petitioner's assertions (Pet. 7-8), the imposition of liability upon petitioner will not automatically lead to the prosecution of legitimate photo processors.[10] Section 1461 requires proof that a defendant "knowingly" mailed obscene materials; a photo processor therefore must be aware of the nature of the photographs placed in the mail in order to be subject to liability. See *Hamling* v. *United States*, 418 U.S. 87, 120-124 (1974); *Smith* v. *California*, 361 U.S. 147, 153 (1959). The typical photo processor uses automatic equipment (see Pet. 7) and therefore may not be aware of the content of most of the photographs that it places in the mail.

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[10]Petitioner also claims (Pet. 7-8) that photographers whose pictures arguably are obscene will be unable to obtain film processing services. However, these photographers retain the options of developing the pictures in their own homes or using a photo processor who develops pictures without using the mail.

It is no doubt conceivable that the application of Section 1461 could in some circumstances lead to a harsh result. The same is true of many statutes. This Court has recognized, however, that "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" serve as bulwarks against such possibilities. *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943); see also *Nash* v. *United States*, 229 U.S. 373, 378 (1913) (relying upon "conscience and circumspection in prosecuting officers"). The parade of horribles hypothesized by petitioner provides no basis for prohibiting the application of Section 1461 to the egregious conduct proven in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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